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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1016

LEONARD R. KAHN,

Petitioner,

vs.

DYNAMICS CORPORATION OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Introduction

Respondent (DCA) in its Brief in Opposition presents a detailed discussion of the factual aspects of the case and for the most part ignores the essential legal questions raised in the Petition. DCA's Brief might be suitable for a response to a "Brief on the Merits" if Certiorari had been granted, but certainly detailed arguments as to all the technical facts of the case is inappropriate at this point. Therefore, Petitioner (Kahn) will respond mainly to those arguments made by Respondent directed to the basic legal questions presented in the Petition.

DCA states, in the first point of its Argument (Resp. Br. pp. 9-10), that the lower courts' decisions did not raise any serious questions of law requiring review by this Court. But Petitioner disagrees and contends that at least three

substantial legal doctrines, introduced in this case, will drastically change the patent law and will seriously impede new technology if allowed to stand. These new doctrines pertain to Late Claiming, Attorney Fees, and the Standard of Obviousness.

(1) The New Late Claiming Doctrine Invalidating Narrowed Claims.

The existing patent structure would be seriously disrupted by this new doctrine because almost all patents are granted after negotiations in which the Government (the Patent Office) persuades the applicant to narrow his claims. Most claims are allowed only after extensive negotiations and the Patent Office is satisfied that the claims have been sufficiently narrowed to avoid all prior art. The new doctrine requires that all narrowed claims, covering inventions which were in use a year or more prior to the submission of the narrowed claims, be declared invalid. Thus, many patents that have found prompt acceptance by the public would be struck down upsetting stable operation in a number of industries based on such patents and significantly increasing the number of patent cases brought to court.

Furthermore, and most importantly, this new doctrine would seriously delay the introduction of new technology, and *"Pat. Pending" would become an obsolete term.* Certainly, one would be foolhardy to put a product on the market until the patent is granted and one is certain of the scope of the claims. Thus, this new doctrine will not only destroy many important patents *but it will seriously delay the introduction of new technology.* [1]

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1. DCA attacks Petitioner's statement, "Testimony established that the claims were supported by the original application . . .". (Resp. Br. p. 19) DCA's argument ignores Petitioner's extensive testimony describing his patent '503. (JA 223-249) Furthermore, neither lower court found new matter in Petitioner's '503 patent. DCA did not offer any testimony to show that the claims are not fully supported. Moreover, the trial court did not base the late claim finding on the lack of support of the claims but stated: ". . . it is immaterial to the defense of late claiming whether or not the claims in suit were supported by the applications as originally filed". (A22)

This concern about the practical result of the opinions below is not just that of a disappointed litigant. This case has already received wide comment by patent law specialists. See Appendix A1 where a responsible patent publication has pointed out that:

> "The Second Circuit in its *Kahn* v. *Dynamics Corp. of America* decision has *further obfuscated* the *Muncie Gear* doctrine by invalidating claims that did not correspond to 'claims of a substantially similar scope', a result *which can only cause applicants to proliferate the number of claims they file in order to avoid the irrationality of this type of holding.*" (emphasis added)

(2) The New Standard for the Award of Attorney Fees and its Punitive Effects.

The Second Circuit has, in conflict with a number of other Circuits, found that conduct short of fraud is sufficient to sustain the award of attorney fees. *But more importantly*, the measure of proof required, as established in the instant case, is of such a low standard that almost any act, if shrouded by scientific complexity, may now be twisted by a skillful advocate to obtain the award of attorney fees[2]. If this case is followed by other circuits,

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2. For example, DCA makes an exhaustive argument (Resp. Br. at 7, 11-13, 17, 25) in an attempt to prove that the Examiner who granted patent '503 was unaware of the Ohl patent and that Petitioner acted in bad faith in not citing Ohl. But the Examiner of the original application *cited Ohl to Petitioner* on page 145 of the original file wrapper, Exh. D-FF. If DCA had simply checked with the Patent Office, it would know that the Examiner of a "continuation" application checks the original file wrapper so as to determine whether it is truly a "continuation" and not a "continuation-in-part" (because new matter was added) and to review the early actions in the prosecution before he makes his own additional search.

DCA failed to offer any evidence whatsoever to overcome the presumption that the Examiner followed normal procedures and read the original file wrapper.

But most importantly, Ohl was not only incorporated by reference in the Oswald patent *but was discussed in some detail* in its *three*-page specification. (For an admission as to this fact, see Resp. Br. at 10.) Oswald's three-page specification was the closest art before all '503 Examiners (and in the courts below).

Surely this should dispense with the question of Petitioner's bad faith in hiding Ohl.

most certainly there will be a wave of punitive fines against inventors[3].

Therefore, if attorney fees are going to be awarded in situations like this one, no prudent inventor dare seek the protection of the courts in maintaining his property rights. Even if an inventor is foolish enough to risk bankruptcy to protect his rights, he will find that worldlier financial backers will be unwilling to take such risks. Thus the independent inventor's sources of capital will dry up. This new standard in awarding punitive attorney fees will go a long way toward destroying one of this Nation's major resources, the independent inventor[4].

DCA principally relies on *Monolith Portland Midwest Co.* v. *Kaiser Aluminum and Chemical Corp.*, 407 F. 2d 288 (9th Cir. 1966) (note the strenuous dissent), to support its theory that conduct merely "in excess of simple negligence" is sufficient to make a case "exceptional" and justify an award of attorney fees. But that case is not on the point. The District Court there found four separate fraudulent representations to the Patent Office (*Id.* at 294), some of them "deliberate lies" (*Id.* at 296). The Court of Appeals ruled that the District Court's findings were supported by the record and that the plaintiff's conduct, even if not actually fraudulent, revealed such "calculated recklessness" about the truth that there was a "serious breach of duty to the patent office" (*Id.* at 297).

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3. This is a serious matter. Review of all cases in the U.S. Patent Quarterly for the calendar year 1974 reveals that defendants claimed fraud or bad faith by inventors and their attorneys in the majority of infringement cases reported.

4. In its argument on bad faith DCA makes a major point of the use of the term "observation" by its witness Brennan of MIT (showing the word in bold type on pp. 18, 25). Obviously, DCA does not recognize that the word "observation" is a laudatory term when used in scientific literature and not a derogatory term implying plagiarism. DCA also conveniently ignores Brennan's other publication, Exh. P-8, which cited Kahn seven times in a three-quarter page "Letter-to-the-Editor" of the Proceedings of the Institute of Radio Engineers and ended with, "These applications were of course motivated by the work of Kahn."

Other cases had emphasized the fraudulent nature of claims in order to support attorney fees awards[5].

Certainly, if punitive attorney fees are to be awarded on the basis of activities *short of fraud* the standard of proof required should be no less stringent than that necessary to prove *actual fraud* on the Patent Office. The courts have held that one who seeks to prove fraud on the Patent Office has a most heavy burden:

> "It is easy to make charges of fraud, but the law rightfully insists that before legal rights may be based upon such charges, they must be established by clear and convincing evidence. The burden is on the party making charges of fraud to establish same by clear and definite proof." *Armour & Co.* v. *Wilson & Co.*, 274 F. 2d 143 (CA 7, 1960)

The Ninth Circuit has agreed:

> "The road to the Patent Office is so tortuous and patent litigation is usually so complex, that 'knowing and willful fraud' ... can mean no less than clear, convincing proof of intentional fraud involving affirmative dishonesty, 'a deliberately planned and carefully executed scheme to defraud*** the Patent Office.' *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245." *Cataphote* v. *DeSoto Chemical*, (CA 9, 1971) 450 F. 2d 769.

Your Petitioner contends that at the very least the same strict standards for proof of fraud on the Patent Office should apply to putative actions short of fraud which

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5. For example, in *California Car Wash Systems Inc.*, v. *Danco*, 348 F. Supp. 958 (D Colo., 1972) the court denied attorney fees even though the patentee failed to bring the closest art, which clearly anticipated and was known to the patentee, to the attention of the examiner.

endanger the fortune and good name of the independent inventor[6].

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6. The standard of proof should be especially strict in high technology cases where skillful patent trial counsel can readily create confusion by the use of highly specialized terminology. In the instant case the courts below, and even some of the scientifically trained witnesses, were confused by the similar sounding terms "square law diversity" and "ratio square diversity".

One reason for the confusion is that Respondent constantly interchanged the use of these two terms. As an example of this Pavlovian style conditioning, DCA posed the following question to Mr. Polkinghorn:

"Why did you consider *square law operation or ratio squared* preferable to . . ." (emphasis added) (JA 773)

Mr. Polkinghorn at the end of his testimony stated:

". . I don't recall using ratio squarer term, but square law detector idea is . . . as old as I am." (JA 851)

even though he had used the term just shortly before in his testimony.

DCA's witness, Mack, testified he would be fired if he used *square law diversity* yet he claimed credit for convincing the Air Force to adopt Kahn's *ratio square diversity. Thus, these almost identical terms have completely different meanings.*

Also, Petitioner in his "ratio square" patent specifically warned against the use of fast acting devices such as "square law" effect circuits stating:

> "If one were to adjust the . . . amplifier time constants faster, . . . a *square law effect, which would be undesirable* . . . and would tend to nullify signal-to-noise ratio gains . . ." (Kahn's '503, col. 6) (emphasis added)

Every piece of prior art cited by DCA uses instantaneous "square law" devices with the sole exception of Oswald/Ohl which was before the Patent Office where such confusion would be treated with contempt.

Nevertheless, DCA persists in invoking instantaneous "square law diversity" systems such as Kahn's licensee RCA's system (Peterson, Beverage & Moore) in an attempt to prove Petitioner's bad faith. DCA not only attempts to use the same semantic confusion here, but conveniently ignores the fact the Petitioner cited Moore's publication describing his early "square law diversity" work with Peterson and Beverage on three separate occasions to the Patent Office. And still DCA has the temerity to claim Petitioner was hiding the Peterson, Beverage & Moore system just as it claimed that Petitioner hid Ohl from the Patent Office. (See footnote 2)

Thus, due to a confusion between two similar sounding terms a gross miscarriage of justice has resulted, even to the point of subjecting Petitioner to a huge claim of attorney fees. Even absent the three serious problems of law discussed herein, in the interest of equity and justice Certiorari should be granted to rectify the injustice caused by this carefully executed scheme to confuse the Courts.

(3) The New Standard of Obviousness

The courts below found that patent '503 was obvious. Petitioner contends that this finding is in direct conflict with the evidence[7]. But more importantly, the procedures followed by the courts below require review by this Court.

The Second Circuit has, in complete disregard of *Graham* v. *Deere* and of 35 USC 103, ignored the requirement of determining the level of "ordinary skill" and used the Patentee as the standard of obviousness. *But the only type of invention that is not "obvious" to its inventor is one*

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7. In the instant case there is a unique opportunity to see the effect of "hindsight" in the determination of obviousness. Mr. Polkinghorn, who was called to testify by DCA in this case, was employed as a Senior Scientist at Bell Labs for some 35 years. While in charge of their Diversity Research program, he reported to Oswald (JA 787) and worked with Ohl (JA 815). Mr. Polkinghorn had a number of inventions, including a diversity patent cited here, (Exh. P-6) This patent was issued on the same day as the Oswald patent, was cross referenced by Oswald, *and used almost word for word the same paragraph citing Ohl.* He therefore had intimate knowledge of the Oswald/Ohl system. (*It is especially noteworthy that DCA did not use one word of Polkinghorn's testimony in its Oswald/Ohl anticipation argument.*) Polkinghorn also had intimate knowledge of all of the other Bell Labs' diversity work cited in this case. Furthermore, Polkinghorn actually built a model of the RCA system. (JA 768-77) *Mr. Polkinghorn had intimate knowledge of every single piece of cited art.*

Certainly this must be a rare situation where we find a highly skilled inventor and scientist , far beyond one of ordinary skill, in charge of research in the pertinent art at this Nation's most prestigious laboratory and fully aware of all cited prior art. Yet, Mr. Polkinghorn, in the penultimate paragraph of his classic paper (Exh. D-C p. 170) describing Bell Labs diversity techniques and his attempts at combining diversity signals, stated that the Bell Labs combiner "... does not seem to have any advantage over the use of ..." the conventional switching (selector) system. Mr. Polkinghorn failed to find *any method* for combining diversity signals that worked better than the switching system. Certainly ratio squaring, the optimum combining method, was not obvious to him. *What better proof can be offered for non-obviousness!*

It is noteworthy that in November 1971, only a few months prior to the trial, another noted *Bell Labs* researcher, Dr. Jakes, stated in a paper describing ratio squaring, there called "maximal ratio combining", (See Petition, p. 14) that:

> "Maximal Ratio Combining Diversity: In this method, first proposed by Kahn ..." (Exh. P-14, p. 82).

which the inventor stumbles onto by accident. All other inventions are obvious to their creators, as they soon become obvious to their colleagues and even to laymen. Once you strip away the language barrier and bring a person to the point where he has the background to consider the invention and *allow hindsight to become a factor*, all inventions become as simple as the rules of arithmetic (which took the ancients thousands of years to develop[8]).

Such a standard of obviousness *would invalidate all patented inventions created by reason rather than by chance* [9].

No matter how one regards the lower courts' standard of obviousness, there can be no question that the trial court failed to make a factual inquiry or finding of the level of "ordinary skill". Mr. Justice Douglas in *Anderson's Black Rock* v. *Pavement Salvage*, 396 US 57 (1969), clearly enunciated on behalf of the Court the importance of following the procedures prescribed by this Court in ascertaining obviousness. Justice Douglas, quoting from *Graham* v. *Deere*, 383 US 1 (1965), stated:

> "Obviousness, as an issue, is resolved as follows:
>
> 'Under §103, the scope and content of the prior art are to be determined; differences between the

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8. A few years ago Petitioner taught the elements of Set Theory to candidates for the Ph.D. degree in Electrical Engineering and today he finds that the same material, as part of the "new math", is being taught to 8 year old children who accept it with little difficulty. Most of the children by the ripe old age of 10 will consider the subject "obvious".

9. DCA attempts to justify the use of Kahn, *the patentee*, as the standard of ordinary skill because "He (Kahn) was in his twenties" when he made the invention. But by the time Kahn invented ratio square diversity he had already made seven other inventions, *two of which were on "switching" diversity systems*, and had authored two engineering papers which were later published in major professional journals and one of these papers introduced a *new type of mathematical analysis of diversity systems*. (Exh. D-EE later published as Exh. J Kahn's Deposition)

> prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved.' *Ibid.*
>
> We admonished that 'strick observance' of those requirements is necessary." (*Id* at 62)

The Trial Court never resolved the "level of ordinary skill in the pertinent art" and the Court of Appeals did not even comment on the failure.

Thus, by failing to follow this Court's careful thought-out logical procedures the courts below found the invention obvious, even though the best research minds in the art failed to solve the important problem and leading engineers throughout the World credited Petitioner with the invention.

Published Comments on *Kahn* v. *DCA*

DCA has given sufficient reason in their Brief in Opposition for the Court to question whether Kahn is all alone in worrying about his case and the natural results flowing from these three New Doctrines. Petitioner has furnished, in the Appendix, excerpts of comments that have already been published in Patent Law Journals. He believes that a mere reading of the headlines of these articles will establish the reality of Petitioner's fears summarized below.

Summary

As is pointed out in the Introduction, Respondent's Brief is an inappropriate reply to a Petition for a Writ of Certiorari. Petitioner has therefore, in the above reply, ignored numerous technical misstatements and erroneous

arguments (such as its defense of the lower courts ignoring the formal pretrial stipulation [10]) and has stressed answers to arguments dealing with the importance of the three new doctrines and their deleterious effects; namely:

a) Introduction of new technology will be delayed, and public and private costs of examining patents will be grossly inflated, (Late Claiming)

b) Determination of obviousness by the courts will once more become a difficult and illogical procedure, (Standard of Obviousness) and

c) The independent inventor, as an important element in the development of new technology, will become, for all practical purposes, extinct. (Award of Punitive Attorney Fees)

Conclusion

For the reasons set out here and in my initial Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Leonard R. Kahn
Petitioner

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10. The stipulation looms large in the case because DCA's stipulated manual contains complete proof of infringement. (See Plaintiff's Reply Br. to the District Court for a thorough reading of Claim 15 by use of a stipulated manual, Exh. P-24.) DCA makes the lame excuse that because of the length of its manual,

> "The stipulation as to that manual could hardly be taken as vouching for correctness of every sentence, much less every word." (Resp. Br. at 21 Footnote)

and therefore it should not be held responsible for the stipulation. But DCA knew, when it signed the stipulation, that out of the 250 pages of its manual only 14 pages discussed diversity operation and out of those only four pages provided details as to how the (in the words of the stipulation) "receivers are utilized in diversity". *And these four pages clearly support the charge of infringement.*

DCA's violation of the stipulation late in the trial effectively destroyed Petitioner's case on infringement in the lower courts and subjected him to a serious charge of bad faith. *And now DCA pleads that it not be held accountable for its stipulation.*

APPENDIX

1974 DEVELOPMENTS

PATENT LAW PERSPECTIVES

Matthew Bender, New York

- The Second Circuit in its *Kahn* v. *Dynamics Corp of America* decision has further obfuscated the *Muncie Gear* doctrine by invalidating claims that did not correspond to "claims of a substantially similar scope," a result which can only cause applicants to proliferate the number of claims they file in order to avoid the irrationality of this type of holding, see §A.7.

* * *

§ A.7 Late Claiming and New Matter

As if it were not already difficult enough to sustain a patent in the Second Circuit, the New York district court in *Kahn* v. *Dynamics Corp. of America* [7] has unnecessarily and improperly added to the patentee's woes by imposing a further gloss [8] on the already over-polished *Muncie Gear* doctrine. [9] In *Kahn*, the court held invalid claims

7. — F. Supp. — 180 U.S.P.Q. 247 (S.D.N.Y. 1973).

8. While the Ninth Circuit sustained a patent claim against a *Muncie Gear* attack in *Pursche* v. *Atlas Scraper & Engineering Co.*, 300 F. 2d 467, 132 U.S.P.Q. 104 (9th Cir. 1961) only after determining that the *scope* of the claims in the originally filed application "extended to and included the matter covered" in the claim (132 U.S. P.Q. at 112), the court did not regard scope as a *necessary* but only as a *sufficient* condition and, in fact, discussed *Muncie Gear* in a "new matter" context.

9. *Muncie Gear Works, Inc.* v. *Outboard, Marine & Mfg. Co.*, 315 U.S. 759, 53 U.S.P.Q. 1 (1942). For varying views on *Muncie Gear*, see the discussions of that case in §A.7 of earlier Annual Reviews and Developments as well as Gardner, "Late Claiming," 9 IDEA 321 (1965), and Flocks & Neimark "Is There A Viable Doctrine of Non-Statutory Late Claiming as a Defense in Patent Litigation?", 50 J. Pat. Off. Soc'y 676 (1968).

introduced by amendment more than one year after sale by the defendant of the allegedly infringing devices, on the ground that they did not correspond to "claims of a substantially similar scope" to filed before or within the one year period. [11]

It may be that reasonable policy arguments can be advanced to support the views of those who feel *Muncie Gear* should not be restricted to classic new matter situations, but the *Kahn* view has no redeeming social virtues even if one indulges this view. Because it is impossible to anticipate fully the position an examiner will take or the art he will choose to apply against the claims, one can *attempt* to avoid the pitfalls of a holding such as this only by proliferating originally filed claims unnecessarily as a hedge against the unforeseen. Even assuming the effectiveness of such an approach, it could only serve to increase the private and public costs of patent issuance without any apparent benefits in either sector.

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10. The claims were actually *narrower* than originally submitted claims.

11. 180 U.S.P.Q. at 253. The court added:

> "The applicability of the late-claiming defense is not dependent on whether the claims in issue are based on new matter added to the disclosure subsequent to the filing of the application, and is not rendered inapplicable because broader claims were present in the application as originally filed. Rather, this defense relies on the fact that the claims are directed to subject matter not essentially the same as that originally claimed in the application, and which indeed may be more specific and limited than those originally presented." *Id.*

BNA's
PATENT, TRADEMARK & COPYRIGHT JOURNAL

Number 158

HIGHLIGHTS

Dann Nominated To Be Commissioner: Curtis Marshall Dann has been nominated to be Commissioner of Patents to succeed Robert Gottschalk. Dann, Past President of APLA, is Chairman of DuPont Company's Patent Board.
. . . page A-2

APLA Patent Bill Would Illuminate Patent-Antitrust Interface: Bill drafted by American Patent Law Association has been introduced in House. Proposed legislation differs markedly from Administration's bill (S. 2504) and is noteworthy for its reintroduction of provisions akin to "Scott Amendments". Association's President voices fear that S. 2504 will materially increase cost of applying for patent.
. . . page A-1

Narrowed Claims Are Invalid For Late Claiming: Narrowed patent claims first presented more than one year after subject matter was on sale are foreclosed by doctrine of late claiming. It is immaterial that claims were fully supported in specification as filed since they are not directed to essentially same subject matter as claims originally presented.
. . . page A-2

(emphasis added)

The Bureau of National Affairs, Inc.
Washington, D.C. 20037

BNA's
PATENT, TRADEMARK & COPYRIGHT JOURNAL

Number 158 NEWS & COMMENT

NARROWED CLAIMS ARE INVALID FOR LATE CLAIMING

Narrowed patent claims first presented more than one year after subject matter was on sale are foreclosed by the doctrine of late claiming. It is immaterial, the U.S. District Court for Southern New York deciares, whether or not the claims were fully supported in the specification as filed since they are not directed to essentially the same subject matter as claims originally presented. (*Kahn* v. *Dynamics Corp. of America*, 9/14/73)

* * *

BNA's
PATENT, TRADEMARK & COPYRIGHT JOURNAL

Number 209

NEWS & COMMENT

CA2 SUSTAINS AWARD OF ATTORNEYS' FEES FOR CONDUCT SHORT OF FRAUD

Without hesitation, the U.S. Court of Appeals for the Second Circuit declares that "conduct short of fraud [but] in excess of simple negligence" can make a case "exceptional" for purposes of an award of attorneys' fees under 35 U.S.C. 285, (*Kahn* v. *Dynamics Corp. of America*, 12/10/74)

* * *